IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HUDSON,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL *et al.*,

Defendants.

Case No. 18-cv-4483
Judge Robert W. Sweet

MEMORANDUM IN SUPPORT OF DEFENDANT NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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PRELIMINARY STATEMENT

Through this action, Plaintiff seeks a higher award of benefits under the Bert Bell/Pete Rozelle NFL Player Retirement Plan ("the Plan"), a benefit plan for retired National Football League ("NFL") players negotiated between Defendant NFL Management Council (the "NFLMC"), the representative of the NFL clubs, and the NFL Players' Association ("NFLPA"), the NFL players' union. Plaintiff has already sought these higher benefits, including in administrative proceedings before the Retirement Board, the entity charged with administering the Plan, and in prior litigation in federal district court. Rather than challenge the final decision of the Retirement Board denying his request for higher benefits under Employee Retirement Income Security Act ("ERISA") § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), Plaintiff instead filed this action under ERISA § 502(a)(3) against the NFLMC, NFLPA, the Retirement Board, and the individual trustees, claiming breaches of fiduciary duty and other related claims in a post hoc effort to alter the provisions of the Plan to his benefit. As set forth below and in the motions to dismiss filed concurrently by the other Defendants, Plaintiff's claims are without merit and should be dismissed in their entirety.

With respect to the NFLMC specifically, Plaintiff's claims fail as a matter of law because they are based on the faulty premise that the NFLMC is a "fiduciary" to the Plan, and, in any event, fail to demonstrate that the NFLMC breached any purported fiduciary duty. Accordingly, Defendant NFLMC respectfully requests this Court to dismiss Counts III, IV, and V of Plaintiff's Complaint as to the NFLMC for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

FACTUAL BACKGROUND

The Bert Bell/Pete Rozelle NFL Player Retirement Plan

The Plan in this case is a Taft-Hartley multi-employer retirement plan, which is the result of a collective bargaining agreement between the NFLMC, on behalf of the 32 member clubs of the NFL who contribute to the Plan, and the NFLPA, on behalf of the players. (Compl. ¶¶ 11, 12; *see also* the Plan, page 1.)[1] In accordance with Taft-Hartley, 29 U.S.C. §§ 141-197, the Plan is administered by the Retirement Board, which is comprised of three voting members appointed by the NFLMC (the employer representatives) and three voting members appointed by the NFLPA (the union representatives). (Plan, Art. 8.1, 8.2.) The NFLMC and the NFLPA have the authority to remove and appoint a replacement for any member of the Retirement Board that each has respectively appointed. (Plan, Art. 8.1.)

Pursuant to the terms of the Plan, the Retirement Board is the "named fiduciary" of the Plan within the meaning of ERISA, and has the "full and absolute discretion, authority and power to interpret, control, implement, and manage the Plan . . . ." (Plan, Art. 8.2.) The Retirement Board's authority includes the power to, *inter alia*, define and construe the terms of the Plan, decide claims for benefits, and adopt procedures and rules for the administration of the Plan. (Plan, Art. 8.2.) The Plan does not authorize the NFLMC or the NFLPA to supervise or

[1] Given the central importance of the Plan itself and the fact that Plaintiff has referred to it repeatedly throughout his Complaint, we have attached the Plan to the declaration accompanying this memorandum of law. *See Cent. States, Se. & Sw. Area Health, & Welfare Fund v. Gerber Life Ins. Co.*, 984 F. Supp. 2d 246, 249 (S.D.N.Y. 2013) ("Specifically in the ERISA context, '[b]ecause the Plan is directly referenced in the complaint and is the basis of this action, the Court may consider the Plan in deciding the motion to dismiss.'") (internal citations omitted). The Plan has undergone multiple amendments and restatements during the relevant time period, but the relevant plan document is the document in effect at the time the Plaintiff applied for benefits. Accordingly, we attach a copy of the Plan Amended and Restated as of April 1, 2009 as Exhibit B to the Declaration of Stacey R. Eisenstein ("Eisenstein Decl."), which has been filed together with this memorandum of law.

direct the decisions of the members that they appoint to the Retirement Board in the Retirement Board's administration of the Plan.

The Plan provides total and permanent ("T&P") disability benefits to eligible players. (Compl. ¶ 21.) The Plan provides T&P benefits in four different classifications. For instance, for total and permanent disability that arose from activities "other than League football activities," players receive a monthly total permanent disability benefit. (Compl. ¶¶ 22, 24.) Another classification provides disability benefits for disabilities that "ar[ose] out of League football activities" ("Football Degenerative benefits"). (Compl. ¶ 25.) Because Football Degenerative benefits arise from "League football activities," those individuals entitled to Football Degenerative benefits receive a higher monthly benefit than those whose disability did not result from football activities. (*Id.*)

As provided by the Plan, the Disability Initial Claims Committee decides initial claims for disability benefits under the Plan, and consists of three members: one appointed by the NFLPA, one appointed by the NFLMC, and one medical professional jointly designated by the NFLPA and the NFLMC. (Plan Art. 8.2(b); 8.4.) The classification of disability benefits is determined by the appropriate entity (either the Disability Initial Claims Committee or the Retirement Board), who reviews the facts and circumstances in the administrative record. (Compl. ¶ 27.) Once his disability benefits are classified, a player can petition to be reclassified to receive a higher level of benefit—e.g., Football Degenerative benefits. (Compl. ¶ 28.) The player must show the Retirement Board or the Disability Initial Claims Committee "clear and convincing" evidence that because of "changed circumstances," the player satisfies the conditions of eligibility for a new classification of disability benefits. (*Id.*)

Procedural Background

Plaintiff is former NFL football player, who currently receives T&P disability benefits under the Plan. (Compl. ¶ 10.) Plaintiff filed an initial application for disability under the Plan in March 2010. (Compl. ¶ 32.) After his claim was denied, Plaintiff filed an appeal with the Retirement Board, and the Retirement Board awarded him T&P disability benefits in May 2011. (*Id.*) In its decision awarding Plaintiff T&P benefits, the Retirement Board determined that Plaintiff was ineligible for Football Degenerative benefits because it determined that Plaintiff's injuries were unrelated to League football activities. (Compl. ¶ 33.)

Plaintiff sought reclassification of his T&P benefits in September 2014, arguing that a Social Security Administration finding that Plaintiff was disabled as of December 31, 2009 constituted "clear and convincing evidence" of "changed circumstances" within the meaning of the Plan. (Compl. ¶¶ 34, 35.) The Retirement Board denied Plaintiff's request for reclassification in October 2014, and Plaintiff appealed the Retirement Board's decision in March 2015. (Compl. ¶¶ 36, 37.) In its May 2015 decision denying Plaintiff's appeal, the Retirement Board found that Plaintiff had failed to meet the "changed circumstances" requirement, explaining that "changed circumstances" means "a change in Player's physical condition—such as a new or different impairment—that warrants a different category of benefits." (Compl. ¶ 38.) Following the Retirement Board's decision, Plaintiff filed an ERISA § 502(a) claim in the United States District Court for the Northern District of Mississippi (Case No. 3:15 CV 128-MPM-JAA) alleging that he was entitled to benefits under the Plan in the Football Degenerative category (Compl. ¶¶ 40-44).[2] Thereafter, the parties voluntarily remanded

[2] A copy of Plaintiff's complaint filed in the United States District Court for the District of Northern Mississippi, Case No. 3:15 CV 128-MPM-JAA, is attached hereto (*see* Eisenstein Decl., Ex. C).

the case back to the Retirement Board and after an extended back-and-forth, on November 22, 2016, the Retirement Board again issued a final decision denying Plaintiff's request for consideration. (Compl. ¶¶ 40-46.)

In February 2018, Plaintiff received a notice of a summary of material modifications to the NFL Player Disability & Neurocognitive Benefit Plan ("Disability Plan"), including an amendment regarding "changed circumstances" related to reclassification of T&P benefits (which Plaintiff refers to as the "2017 Amendment"). (Compl. ¶ 47.)[3] Plaintiff's counsel wrote to the Retirement Board, asking whether the amendment would apply retroactively to Plaintiff's claim for benefits and requesting additional information and documents. (Compl. ¶ 48.) The Retirement Board provided documents and information, but did not respond to Plaintiff's question about retroactive application because it "amount[ed] to an advisory opinion . . . ." (Compl. ¶¶ 50-51.)

Plaintiff's Claims

The gravamen of Plaintiff's Complaint is that the Retirement Board violated ERISA and its fiduciary duties under ERISA by failing to define "clear and convincing evidence" and "changed circumstances," thereby "lock[ing] [Plaintiff] into a lower category of benefits." (Compl. ¶¶ 67-88.) Plaintiff also asserts three claims against the NFLMC, all contingent upon the NFLMC being a fiduciary to the Plan and having breached its fiduciary duties: (1) the NFLMC breached its fiduciary duty under ERISA by failing to monitor the actions of the members of the Retirement Board that it appointed (Count III); (2) invalidation of the 2017 Amendment, to the extent it applies to the Plan, which Plaintiff asserts cannot be applied

[3] The Disability Plan is a separate benefit plan negotiated by the NFLMC and NFLPA. Effective January 1, 2015, the Plan no longer provides T&P benefits (except that the Plan continues to provide T&P benefits for applications already approved). Rather, all T&P benefits applied for on or after January 1, 2015 are now provided under the Disability Plan.

retroactively against the Plaintiff (Count IV); and (3) the Plan allegedly attempts to relieve the Plan's fiduciaries from any responsibility or liability in violation of §§ 410 and 404(a)(1)(A) & (B) of ERISA (Count V). Plaintiff makes these claims without any factual allegations supporting his claim that the NFLMC is a fiduciary, other than the conclusory statement that the NFLMC is a fiduciary because it appoints and removes members of the Retirement Board. The NFLMC now moves to dismiss those counts as to the NFLMC.

STANDARD

To survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must plead sufficient facts to state a claim upon which relief may be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). On a motion to dismiss under Rule 12(b)(6), all factual allegations in the complaint are accepted as true, and all reasonable inferences are drawn in the plaintiff's favor. *Littlejohn v. N.Y.C.*, 795 F.3d 297, 306 (2d Cir. 2015). However, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions . . . ." *Twombly*, 550 U.S. at 555 (internal citations omitted). Accordingly, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556).

ARGUMENT

To state a claim for fiduciary breach under ERISA, a plaintiff must allege facts that show the defendant was a fiduciary of the retirement plan and breached its fiduciary duty. 29 U.S.C. §§ 1105(a); 1109(a); *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 131 F. Supp.

3d 103, 121 (S.D.N.Y. 2015). Therefore, to survive a motion to dismiss, Plaintiff must allege facts demonstrating that the NFLMC is a fiduciary of the Plan for purposes of the asserted claims, and that the NFLMC breached its fiduciary duty. Plaintiff has done neither, and therefore his claims against the NFLMC should be dismissed as a matter of law.

I. Plaintiff Does Not And Cannot Demonstrate That The NFLMC Is A Fiduciary To The Plan Under ERISA.

Like all Taft-Hartley multi-employer pension plans, the Plan is subject to ERISA. 29 U.S.C. §§ 1001-1461; *Trs. of Local 138 Pension Tr. Fund v. F.W. Honerkamp Co.*, 692 F.3d 127, 128 (2d Cir. 2012) ("ERISA is a comprehensive statutory scheme regulating employee retirement plans."). Under ERISA, both single-employer and multi-employer plans must have a named fiduciary with authority to control and manage the operation and administration of the plan. 29 U.S.C. § 1102(a).[4] A fiduciary to a plan may be named formally—for instance, in the plan instruments. *Id.* A person or entity may also be a *de facto* fiduciary if he exercises "discretionary authority or discretionary control" with respect to the disposition of plan assets, plan money or investments, or the administration of the plan. 29 U.S.C. § 1002(21)(A).

Plaintiff does not—and cannot—allege that the NFLMC is a named fiduciary under the Plan. The Plan expressly states that "[t]he Retirement Board will be the 'named fiduciary' of the

[4] In contrast to a single-employer plan, which is funded and administered by a sole employer, 29 U.S.C. § 1002(16)(B), multi-employer plans are maintained pursuant to collective bargaining agreements between employers and employee organizations, which require multiple employers—such as NFL clubs—to "pool contributions into a single fund that pays benefits to covered retirees who spent a certain amount of time working for one or more of the contributing employers." *Honerkamp*, 692 F.3d at 129; *see also* 29 U.S.C. § 1002(37)(A). Multi-employer plans offer advantages in certain situations that make single-employer plans unfeasible, for example in industries where employees transfer among employers. *See Honerkamp*, 692 F.3d at 129; *see also N.Y. Times Co. v. Newspaper & Mail Deliverers'-Publishers' Pension Fund*, 303 F. Supp. 3d 236, 241 (S.D.N.Y. 2018) (Sweet, J.). Multi-employer plans are overseen by a board of trustees with equal voting strength held by representatives of the union and the employers who contribute to the plan. *See, e.g.*, *Flynn v. Hach*, 138 F. Supp. 2d 334, 337 (E.D.N.Y. 2001).

Plan . . . ." (Plan, Art. 8.2.) Nor can the NFLMC be viewed as a *de facto* fiduciary under ERISA. The Complaint puts forth no allegation that the NFLMC exercised any discretionary authority or control over the Plan's assets, nor does it allege that the NFLMC had any discretionary responsibility in the management or administration of the Plan. In fact, the Complaint barely mentions the NFLMC, and certainly does not allege that the NFLMC was involved in any way in managing or administering the Plan. Merely calling the NFLMC a "fiduciary" does not make it so. 29 U.S.C. § 1002(21)(A); *see also Sommers Drug Stores Co. Emp. Profit Sharing Tr. v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1459-60 (5th Cir. 1986) ("[A] person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control."); *Trs. of Sheet Metal Works Nat'l Pension Fund v. Kakareko (In re Kakareko)*, 575 B.R. 12, 23 (Bankr. E.D.N.Y. 2017) ("The definition of 'fiduciary' under ERISA focuses on the exercise, as well as the possession, of authority or control.") (internal citations omitted).

Because Plaintiff cannot reasonably allege that the NFLMC exercises "discretionary authority or discretionary control" over the Plan, Plaintiff suggests that the NFLMC is a fiduciary of the Plan "by virtue of [its] powers to appoint and remove other fiduciaries"—specifically its authority to appoint and remove voting members of the Retirement Board. (Compl. ¶ 11.) Plaintiff alleges that this authority confers upon the NFLMC the fiduciary responsibility to monitor the Retirement Board, including by supervising, and when necessary, overturning the decisions of the Retirement Board. (*Id.*) Even assuming that these allegations accurately describe the role of the NFLMC as set forth by the Plan (and they do not), they cannot as a matter of law establish that the NFLMC possesses the authority to direct the determinations of its appointees. Indeed, the Supreme Court has held that an employer who appoints a

representative to the board of trustees "may [not] direct or supervise the decisions of a trustee he has appointed." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981).[5]

Moreover, the Second Circuit has never held that employers who have the authority to appoint and remove trustees makes the employer itself a fiduciary, and courts in this District have specifically rejected Plaintiff's contention to the contrary. For instance, in *In re WorldCom, Inc.*, Judge Cote rejected the plaintiffs' assertion that "the right to appoint and to remove the individuals who will fill these positions [Plan Administrator and Investment Fiduciary] is a fiduciary function [conferring] the fiduciary duty to monitor the performance of an appointee." *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745, 760 (S.D.N.Y. 2003). Judge Cote noted that the plaintiffs' argument "goes too far," because "[i]t would make any supervisor of an ERISA fiduciary also an ERISA fiduciary." *Id.* *See also In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 473 (S.D.N.Y. 2005) ("ERISA does not attach liability for investment decisions to fiduciaries whose roles were limited to appointing, retaining and removing other fiduciaries.").

Here, too, the NFLMC's authority to appoint and remove members from the Board does not—and legally cannot—confer the NFLMC with a fiduciary authority over the decisions made by the members that it appoints. Accordingly, Plaintiff's claims against the NFLMC, each of which presupposes that the NFLMC serves as a fiduciary with discretionary control over the administration and assets of the Plan, fail as a matter of law.

[5] Imposing a fiduciary obligation on contributing employers to multi-employer plans to direct the determinations of employer representatives on the board of trustees also would be contrary to the long-standing structure of multi-employer plans, which often consist of dozens of contributing employers. If simply having a contribution obligation to a multi-employer pension plan requires a contributing employer to supervise and direct the decisions of the employer representatives it appoints to the board of trustees, multi-employer plans would have numerous employers directing their actions, and the system would not work.

II. In Any Event, Plaintiff Cannot Demonstrate That The NFLMC Breached Any Purported Fiduciary Duties.

Regardless of whether Plaintiff can demonstrate that the NFLMC had a fiduciary duty with respect to appointing and replacing the employer representatives to the Retirement Board, Plaintiff's claims against the NFLMC should be dismissed because Plaintiff cannot demonstrate as a matter of law that the NFLMC beached any purported duty. Where courts have found that the power to appoint and remove trustees of a multi-employer plan establishes *any* fiduciary responsibility, that fiduciary responsibility has been limited to the performance of actually appointing and removing trustees. *See, e.g., Grossman v. Dirs. Guild of Am., Inc.*, No. EDCV 16-1840, 2017 WL 5665025 (C.D. Cal. May 1, 2017) (noting that "the Ninth Circuit has extended fiduciary status to entities whose only control of the administration of the plan is through the power to appoint and remove plan trustees," but concluding that "[s]uch an entity owes a fiduciary obligation only in the performance of its appointment and removal role"); *Int'l Bhd. of Elec. Workers, Local 90 v. Nat'l Elec. Contractors Ass'n*, No. 3:06cv2 (SRU), 2008 WL 918481, at *7 (D. Conn. Mar. 31, 2008) (finding that employer association representing contributing employers was an ERISA fiduciary by virtue of its power to appoint and remove trustees, but noting that the association's "fiduciary obligations are, of course, limited to those aspects of the plan over which [it] exercises authority or control") (quoting *Sommers Drug Stores*, 793 F.2d at 1459-60); *see also Sommers Drug Stores*, 793 F.2d at 1459-60 ("[A] person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control. For example, if an employer and its board of directors have no power with respect to the plan other than to appoint the plan administrator and the trustees, then their fiduciary duty extends only to those functions.") (internal citations omitted). Plaintiff's allegations of breach of fiduciary duty in this case go well beyond the NFLMC's appointment or removal of employer

representatives to the Retirement Board. Indeed, the Complaint includes no allegation that the NFLMC's performance in appointing and removing employer representatives was not with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).

Instead, in putting forth allegations concerning the NFLMC's failure to change determinations made by the Retirement Board, Plaintiff seeks to impose a broader "duty to monitor." Plaintiff alleges that the NFLMC should have "monitored" the Retirement Board by requiring the Retirement Board to adopt revisions to and interpretations of the Plan more favorable to Plaintiff. (Compl. ¶ 94.) But if the NFLMC had directed the Retirement Board to change its determinations, the NFLMC would have exceeded its limited authority to appoint and replace employer representatives to the Retirement Board, and would have run afoul of the Supreme Court's explicit prohibition against employers directing the decisions of their appointees to a multi-employer plan's board of trustees.[6] *See Amax Coal Co.*, 453 U.S. at 330.

Even assuming that Plaintiff is correct that appointing representatives to the Retirement Board somehow imposes a "duty to monitor" those appointees, the Complaint contains no allegations that the NFLMC breached this duty. The duty to monitor multi-employer plan trustees at most requires that "at reasonable intervals the performance of trustees and other fiduciaries should be reviewed . . . in such a manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards,

[6] Plaintiff's arguments fail for the additional reason that the NFLMC only has the authority to appoint three employer trustees to the Retirement Board. Therefore, even if the NFLMC could direct the actions of its appointed trustees—which it cannot—the NFLMC would still be unable to direct the actions of the Retirement Board. (Plan, Art. 8.1, 8.2). For Plaintiff's claim to succeed, the NFLMC would be required to take actions for which it lacks the authority to take not only under the law, but also under the terms of the Plan.

and satisfies the needs of the plan." *Local 90*, 2008 WL 918481, at *7 (quoting *Liss v. Smith*, 991 F. Supp. 278, 311 (S.D.N.Y. 1998)). An appointing fiduciary is "not obliged to examine every action taken by [his appointees] but [is] obliged to take prudent and reasonable action to determine whether the administrators were fulfilling their fiduciary obligations." *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d at 477 (internal citations omitted). The Complaint's allegations against the NFLMC related to its alleged failure to monitor the Retirement Board are threadbare at best. Indeed, the NFLMC is barely mentioned throughout the Complaint, and Plaintiff supports his allegations against the NFLMC with conclusory statements that the NFLMC "should have" known that the Retirement Board's administration of the Plan did not comply with ERISA. Plaintiff simply has not offered any details regarding what the NFLMC did or did not do with respect to the Retirement Board. Plaintiff has pleaded no facts to permit the inference that the NFLMC failed to monitor its appointed employer representatives.

Furthermore, courts have noted that an appointing fiduciary's duty to monitor is limited, and have refused to impose a broad fiduciary duty in this context. Courts have limited the duty to monitor to practical tasks related to appointing those trustees—such as monitoring appointees' attendance at meetings and confirming that appointees voted on matters. *See Local 90*, 2008 WL 918581, at *8 (in one of the very few multi-employer cases in which a court found that an appointing entity had a duty to monitor the trustees it appointed, the court found that the appointing entity had breached its duty by failing to monitor and replace trustees who did not attend meetings or cast votes on plan issues). This limit is logical and appropriate, as imposing broad fiduciary duties on an appointing fiduciary undermines the rationale of appointing a board of trustees in the first place. *See, e.g., Johnson v. Evangelical Lutheran Church in Am.*, No. 11-23 (MJD/LIB), 2011 WL 2970962, at *5 (D. Minn. July 22, 2011) ("The duty to monitor is

limited and does not include a duty 'to review all business decisions of Plan administrators' because 'that standard would defeat the purpose of having trustees appointed to run a benefits plan in the first place.'" (quoting *Howell v. Motorola*, 633 F.3d 552, 573 (7th Cir. 2011)); *Lingis v. Motorola, Inc.*, 649 F. Supp. 2d 861, 881-82 (N.D. Ill. 2009) (noting that the duty to monitor "has clear limits," and rejecting plaintiffs argument that it entails monitoring the prudence of a specific investment, as such a broad duty to monitor would undermine the rational of creating an investment committee).

The allegations in the Complaint do not show that the NFLMC failed to monitor its appointees in the limited way recognized under the law. Rather, Plaintiff complains that the NFLMC did not second-guess the determinations made by the Retirement Board, authority that the NFLMC does not possess. Far from containing allegations that the Retirement Board failed to attend meetings or refused to respond to inquiries, the Complaint acknowledges that the Retirement Board was active and responsive to Plaintiff's appeals and requests for information and documents. Plaintiff simply disagrees with the Retirement Board's determinations. By asking this Court to hold the NFLMC accountable for the Retirement Board's interpretation and administration of the Plan, and requiring the NFLMC to direct the Retirement Board to change its determinations, Plaintiff impermissibly attempts to expand any purported duty to monitor—to the extent it exists in the first place. Therefore, claims against the NFLMC must be dismissed.[7]

[7] Plaintiff asserts that the NFLMC is liable for the Retirement Board's alleged breach of fiduciary duty because of the NFLMC's duty to monitor its appointees. But in order for Plaintiff to have such a claim against the NFLMC—if such a claim even exists—he must first adequately plead a breach of fiduciary duty claim against the Retirement Board. Courts have recognized that, "[a] claim for breach of the duty to monitor requires an antecedent breach to be viable," and "[w]ith no antecedent breach by the monitored parties in this case, …[the] duty to monitor claim fails." *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 580 (S.D.N.Y. 2011). If in deciding the Retirement Board's Motion to Dismiss this Court determines that Plaintiff has failed to state a claim against the Retirement Board and dismisses the

III. Counts IV And V Fail To State Any Claim Against The NFLMC

Count IV, which seeks to require enforcement of the terms of the Plan in existence prior to 2017, and prior to the 2017 Amendment, also must be dismissed against the NFLMC. As an initial matter, Plaintiff fails to allege that the 2017 Amendment is even applicable to the Plan. But even if the 2017 Amendment did apply to the Plan (which it does not), the NFLMC does not have the authority under the Plan to interpret, apply, or enforce the terms of the 2017 Amendment, or any other terms of the Plan. Under the Plan, only the Disability Initial Claims Committee and the Retirement Board have that authority. (Plan, Art. 8.2, 8.5).

Plaintiff's Complaint lacks any allegation that the NFLMC has the authority to enforce the terms of the Plan. Rather, Plaintiff's Complaint alleges only that the NFLMC has the authority to appoint and replace the three employer trustees on the Retirement Board, and that the NFLMC, jointly with the NFLPA, has the authority to amend the Plan. (Compl., ¶ 11). As explained above, however, neither the authority to appoint and replace trustees, nor the joint authority to amend the Plan, provides the NFLMC the authority to interpret and apply, or to not apply, the terms of the Plan to a participant's claim. Accordingly, Plaintiff's claim seeking to compel the NFLMC to use a power that it is not alleged to possess is both implausible and factually insufficient, and should therefore be dismissed. *See Iqbal*, 556 U.S. at 663.

Additionally, because Plaintiff has failed to state a claim against the NFLMC for breach of fiduciary duty, Count V also must be dismissed as to the NFLMC. Under Count V, Plaintiff attempts to void a provision of the Plan "[t]o the extent that [it] attempts to relieve these Defendants of their responsibility or liability to discharge their fiduciary duties under ERISA." (Compl. ¶ 110.) Specifically, Plaintiff seeks to have the "constructive knowledge" provision in

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Complaint as to the Retirement Board, the Court must also dismiss the Plaintiff's claims against the NFLMC.

the Plan's breach of fiduciary duty statute of limitation language declared null and void, either because it violates ERISA or because the Retirement Board failed to adequately explain it in the Summary Plan Description that Plaintiff received. (Compl. ¶¶ 109-112.) However, because Plaintiff has failed to allege sufficient facts to demonstrate that the NFLMC even breached any fiduciary duty, Count V is irrelevant as to Plaintiff's claim against the NFLMC. Accordingly, Count V should be dismissed against the NFLMC.[8]

CONCLUSION

For the reasons stated above, the NFLMC respectfully requests that this Court dismiss Plaintiff's Counts III, IV, and V against the NFLMC for failure to state a claim upon which relief may be granted, and dismiss the NFLMC from this action.

[8] Plaintiff's Complaint should be dismissed for the separate and independent reason that the statute of limitations has run, as set forth more fully in the brief filed by the Retirement Board filed concurrently with this brief.

Dated: August 31, 2018

Respectfully submitted,

/s/ Stacey R. Eisenstein

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